

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

MANHATTAN COLLEGE OF MUSIC,

Employer

and Case No. 2-RC-23361

**NEW YORK STATE UNITED TEACHERS/ AMERICAN
FEDERATION OF TEACHERS, AFL-CIO,**

Petitioner

DECISION AND DIRECTION OF ELECTION

New York State United Teachers/American Federation of Teachers, AFL-CIO, herein called Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act ("the Act"), as amended, seeking to represent a unit of all faculty who teach exclusively in the Pre-College division who are employed by Manhattan College of Music ("Employer"), excluding all other faculty.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2. At the hearing in this matter, the issues raised included the status of the faculty who teach in both the petitioned-for Pre-College division and the excluded College Division. These employees were called dual function employees¹ or hybrid employees. The parties are also in disagreement regarding whether six individuals, Linda Chesis, Mark DeLeprioria, John Forconi, Maitland Peters, McNeil Robinson, and Mark Silverman, all chairpersons in the College Division and on the Pre-College Division faculty, are supervisors under Section 2(11) of the Act in the College Division and thus excluded from eligibility to vote. An issue was raised at the hearing by Petitioner as to whether two individuals employed in the Pre-College Division, Chris Rosenberg and Sonja Mason, also should be excluded as statutory supervisors.

On the record as a whole, I find that a unit consisting of the entire faculty who teach in the petitioned-for Pre-College Division, regardless of whether they are employed elsewhere by the Employer, constitutes an appropriate unit for the purposes of collective bargaining. I also find that the Petitioner failed to establish that the College Division chairpersons, who work as instructors in the Pre-College Division, are supervisors within the meaning of Section 2(11) of the act and I therefore will not exclude them from voting in the election. I have, accordingly, directed an election in such a unit.

Upon the entire record² in this proceeding it is found that:

1.

The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

The parties stipulated, and I find, that the Employer is a not-for-profit educational corporation chartered by the regents of the University of the State of New York, and maintains an office and place of business located at 120 Clairmont Avenue, New York, New York. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$1 million, and purchases and receives at its facility goods, materials, and services valued in excess of \$5,000 directly from suppliers located outside the State of New York. Based upon the stipulation of the parties, I find that the Employer is engaged in commerce with the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ In its brief, as discussed below, Petitioner contends that the employees in question are not dual function employees.

² Briefs have been filed by the Petitioner, and the Employer, and have been duly considered.

³ The record is silent on why there is a discrepancy between the two joint exhibits. The first lists salaries for 46 individuals and the second lists salaries for 45 individuals who purportedly are working in both Divisions. I assume this was an inadvertent and inconsequential error.

⁴ Petitioner raised no issue with respect to the exclusion of Dean of Faculty David Gerber as a statutory supervisor.

⁵ Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and the 30th day after the date of this Decision.

⁶ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

⁷ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make a list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **April 2, 2009**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁸ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by no later than **April 9, 2009**.

3. The parties stipulated and I find that the Petitioner, New York State United Teachers/American Federation of Teachers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4.

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) of the Act.

5.

Petitioner seeks to represent all faculty employed by the Employer who work exclusively in the Employer's Pre-College Division. Petitioner would exclude from that unit those employees who work in the College Division and those who are dually employed in the College Division, and all other employees and guards and supervisors as defined in the Act. The parties stipulated that all faculty who have a contract to teach in the Pre-College Division, regardless of the hours they teach, are eligible to vote in any election conducted pursuant to this petition. Further, the parties stipulated that faculty employed exclusively in the College Division should be excluded from the bargaining unit. The parties are in disagreement on whether those members of the College Division faculty who also teach in the Pre-College division should be included in the Unit.

The parties are also in disagreement regarding whether six individuals, Linda Chesis, Mark DeLeproria, John Forconi, Maitland Peters, McNeil Robinson, and Mark Silverman, are supervisors under Section 2(11) of the Act in the College Division and thus excluded from eligibility to vote in the Pre-College unit because of their supervisory status. The parties stipulated that none of these six individuals is a supervisor of any Pre-College division employees. Finally, during the course of the hearing, the Petitioner raised an issue as to whether two individuals employed in the Pre-College Division, Chris Rosenberg and Sonja Mason, should be excluded as statutory supervisors. However, in its brief, Petitioner appears to have abandoned its contention that Rosenberg and Mason are statutory supervisors who must be excluded from the unit.

I.

RELEVANT FACTUAL BACKGROUND

A.

The Employer's Operations

The Employer operates a music conservatory which is comprised of two separate and distinct divisions. The College Division provides a collegiate and graduate level education in music to college-aged students which leads to undergraduate and graduate level degrees. There are various departments in the College Division, including strings, instruments and choral, and each department has chairpersons who report to deans and assistant deans.

The Employer also operates a Pre-college Division for students from age 5 through 18, who are interested in music, headed by Dr. Joanne Polk who has served as its Dean since 2002. This division is intended to not only allow young musicians to develop their skills, but to serve as a feeder program to attract promising students to the college. The program consists of classroom education where students learn music theory, receive ear training and participate in large ensembles. There are classrooms and studios, as well as halls, for use by orchestras and a musical theatre. Students may participate in any one of four orchestras or four choruses.

Dr. Polk supervises the Pre-College faculty and the four full-time staff members. Each year approximately 80 students graduate from the Pre-College program. Dr. Polk also oversees the admissions process for the new class which requires auditions for all approximately 300 applicants each year. All applicants for the Pre-College division must perform in an audition before a panel which is comprised of both exclusively Pre-College faculty and those College faculty members who also work as Pre-College Division instructors. Whether the faculty member is exclusively employed in the Pre-College Division or is also employed in the College Division, he or she uses the same criteria in arriving at a score for the applicant's audition and submits his or her score to Dr. Polk, who stated that all recommendations, regardless of the Division in which they are employed, receive the same weight. In addition to auditions, each student is graded each semester and at the end of the second semester must play for 10 minutes before a jury of teachers who play that instrument. The jury is composed of faculty who work exclusively in the Pre-College Division and who also teach in the College Division.

The Employer employs approximately 150 instructors for the Pre-College program which operates almost exclusively on Saturdays throughout the school year. Approximately one third of the faculty members are instructors who are also members of the College Division faculty. While the Saturday program had run from 8am through 6pm, the recent enrollment of 450 students in the Pre-College Division has increased from 392 students 419 students in the prior two years. This increase in student population has required that the hours of instruction be extended to 8pm. Some of the instructors in the Pre-College Division teach in a classroom setting, while many other instructors teach a private lesson where the student receives a one-hour lesson. While most of the instruction is done at the Employer's facility, a very small percentage of instructors will give their lessons off site and occasionally on days other than Saturday. Those instructors who also teach in the College Division generally use their regular studios where they teach during the week, but exclusive Pre-College instructors also use the College studios.

When a faculty member who served on the audition panel submits his or her grade as described above, the faculty member indicates whether he or she would accept this student into his or her class. The Employer looks at the student's request for a teacher and attempts to find a match. If there is no match, the Employer assigns the instructor who will teach the newly accepted student.

All pre-College faculty members, including those who are also on the College Division faculty, have a one-year contract. When an opening occurs for an instructor in the Pre-College Division, consistent with the Employer's desire to create an effective feeder program for its College division, Dr. Polk looks to the College Division faculty to fill it. However, she also looks at resumes that have been received to find those with experience in teaching children who are well known in the music field. In making the hiring decisions, Dr. Polk works with Yvette Loynaz, the Administrative Director, and Rebecca Charnow, the Director of the Young People's Division, who participate in the hiring process in some unspecified way. Dr. Polk also stated that the President of the Employer is "ultimately part of the process."

The Employer maintains and enforces an Administrative Faculty Handbook of Policies and Procedures for the Pre-College Division. This handbook contains the instructions to all Pre-College Division instructors, whether they teach exclusively in the Pre-College Division or not, on how they can utilize the division's office to aid them in their work. It contains sections regarding the scheduling of recitals, absentee policy, attendance policy, substitute teacher policy, library including the use of the library website, piano tuning issues, room usage, and grading policy.

The Pre-College Division's requirements for the level of competency at which they expect their students at various ages to play was recently revised. A committee comprised of faculty who worked exclusively at the Pre-college Division and faculty who worked in both divisions revised the expectations for students under the age of 11 and those from age 12 through 15.

There is a Pre-College Division Faculty Council which acts as a liaison between the faculty administration and the faculty. It brings concerns of the faculty to the administration. It usually meets several times each semester, but at the least, it meets once per semester with Dr. Polk. This council is comprised of those who work exclusively for the Pre-College Division and those who work for both divisions. John Forconi, a department chair in the College Division, currently is one of the members of this Council. The eight members of the council are elected by their peers.

The administration of the Pre-College Division communicates with all its employees, regardless of whether they are exclusively employed in that division or not, by e-mail and an individualized folder which is available for inspection each Saturday.

B.

Pre-College Division Faculty Compensation

The record includes an exhibit which sets forth the hourly pay rate for the 150 faculty members. There are 104 faculty members listed on that exhibit who work exclusively in the Pre-College Division this semester. The salary range for these employees runs from a low of \$33 per hour to a high of \$142 per hour. The vast majority of these employees, 96 of the 104, earns between \$33 and \$70. The median salary for all exclusively Pre-College faculty members is \$46 per hour. The faculty members who teach in both the college and pre-college divisions earn between \$43 per hour and \$239 per hour. Of these 46 hybrid employees, 16 earn less than \$70 per hour, while 30 earn between \$80 per hour and \$239 per hour. The median salary for the hybrid faculty is \$97 per hour and eight of them earn between \$145 and \$239 per hour.

The record also includes an exhibit listing 45 individuals³ who are members of both the Pre-College and College Division faculties which sets forth the number of hours they worked or are scheduled to work per week in both divisions for the Fall 2008 and Spring 2009 semesters. This document shows 2 individuals who have not worked in either semester in the Pre-College Division, and one individual who worked only 1 hour in the Fall semester and none in the Spring semester. Of the remaining 42 named faculty members, 14 worked only one hour this Spring 2009 semester. The remaining 28 named individuals are working in the Pre-College Division from 2 to 13 hours this Spring 2009 semester. Dr. Polk testified that on average, salaries are higher in the College Division. The parties stipulated that any faculty member who was given a contract for that year has a reasonable expectancy of work and would be eligible to vote in the election.

Raises for faculty members are determined by the vice president for finance and the chief financial officer based on available money in the budget which is approved by the Employer's Board of Trustees.

Those faculty members who teach in the Pre-College Division are no longer eligible for any health insurance or sick leave, although they were until 2002 when the Employer terminated those benefits. College Division faculty are eligible for health benefits if they work 10 hours per semester. The calculation for satisfying the 10 hours work for College Division instructors does include their hours worked in the Pre-College Division.

As it appears that many College division instructors earn a higher wage rate than those exclusively employed in the Pre-College Division, and they are in most cases paid the same rate regardless of where they work, the Employer has started a tuition surcharge for parents of Pre-College Division students whose child is studying with a College instructor. The surcharge is paid to the Employer and is used to pay the instructor his or her College Division pay rate. As some parents are unable to pay the surcharge, it appears that the Employer has decided that going forward, they would guarantee the College division instructor the higher rate in any event.

C.

College Division Department Chairpersons

A Faculty Handbook is in effect and relates solely to the faculty of the College Division. A copy of the Faculty Handbook was made a part of the record. It specifically states that the purpose of the handbook is to inform the College Division faculty of the Employer's employment policies, benefits, and procedures and to describe the overall relationship between the faculty and the Employer. The handbook sets forth a description of the responsibilities of the faculty members as educators, as co-workers, and as employees.

The record has very limited testimony regarding the duties of the College Divisions Departmental Chairpersons. David Gerber, the Dean of the Faculty for Instrumental Performance in the College Division, has also taught in the Pre-College Division since July 2008. Prior to his current College Division position, Mr. Gerber spent 20 years as the Chairperson of the Strings Department. He testified that the duties of a department chairperson include the oversight of the faculty in their department. He said that in collaboration with two faculty deans, of which he is one at this time, the department chairperson ensures that the Employer's policy is reviewed and administered appropriately when a problem needs to be addressed. The chairperson also makes sure that the faculty member's student load is manageable, that the Employer's policies are enforced fairly, that the departmental faculty members' voices are heard and that a consensus is reached by the faculty on various issues. He also said that chairpersons would collaborate with the dean regarding the hiring and firing of faculty and that the decision would be made together between the vice president, the dean of faculty and the relevant chairperson. There were no examples of when this occurred or how frequently, nor was there any specific testimony as to the respective roles of the chairperson and dean in the decisional process. When asked if the chairperson would recommend hiring and firing, Mr. Gerber replied affirmatively, but said that whether the recommendation was followed was a complicated matter because it would vary depending on the circumstances.

As a dean, he oversees the chairpersons of the various departments. He estimated that an individual will spend between 5% and 10% of his or her time performing the duties of a chairperson, but when pressed further stated that a chair who worked 40 hours per week would spend 25 hours performing chairperson work.

Petitioner relies significantly on the Faculty Handbook to establish the chairpersons as supervisors. In the provision on Faculty Appointments, the Handbook states the vice president/dean of faculty, in consultation with the president, makes the final decision regarding hiring. The role of the chairperson is described as consultative. Similarly, regarding termination, the final decision rests with the vice president/dean of faculty. The role of the chairperson is again described as consultative and collaborative, without any further specificity or examples. The handbook also asserts that it is hoped that chairpersons would have input in negotiating salaries with individual faculty members.

Regarding grievances, the chairperson serves to schedule and establish a faculty committee to hear any grievances that arise. The Employer's grievance procedure permits the faculty committee to vote on the grievance. The role of the chairperson in determining grievances appears to be limited to administrative matters.

Under certain circumstances, chairpersons may serve on the 13-person faculty Council, to ensure that underrepresented departments have a voice on this advisory faculty board.

II.

POSITION OF THE PARTIES

In support of its argument for a unit which excludes any instructor who also works in the College Division, Petitioner contends that there is no community of interest between them and the instructors who work for the Employer exclusively in the Pre-College Division. Petitioner alleges that there is a huge discrepancy in wages with College Division faculty getting the higher salary rates, that there are benefits for those who work in the College division that Pre-College division faculty members don't receive, that there is a lack of functional integration between the Employer's two divisions, that there is scant evidence regarding the common supervisions of those who work in the College division and those in the Pre-College division, that those who work in the College division have different work locations than the other Pre-College division faculty members, and that the Employer has created two classes of employees. Regarding the inclusion of department chairpersons, in the event the Regional Director concludes that those who work in the College Division should be included with those other instructors in the Pre-College division, Petitioner contends that they are supervisors in the College division and should be excluded. The Petitioner took no position in its brief regarding the status of two individuals employed in the Pre-College Division, Chris Rosenberg and Sonja Mason; although at the hearing Petitioner contended that they are excluded as statutory supervisors. It appears that Petitioner has abandoned its contention that Rosenberg and Mason are statutory supervisors.

The Employer contends that the Board should direct an election in a unit comprised of all Pre-College faculty members and that otherwise the unit is inappropriate as it would be a fragment of the unit of instructors at the Pre-College Division. Further, the Employer contends that the Petitioner failed to meet its burden that the six chairpersons were statutory supervisors in the College division. Further, the Employer argues that even if the Board were to find them to be statutory employees, they do not perform statutory duties for more than 50% of their time and should be excluded on that basis.

III. DISCUSSION

A.

Applicable Legal Standards

The Employer is comprised of two separate divisions. One division provides a full-time college education in music and the other provides a Saturday program for pre-college students who are interested in music. The Union seeks to represent only the faculty at the Pre-college Division, of which about a third is comprised of faculty members from the College Division. The parties agreed that the College Division faculty is not to be included in the petitioned-for unit. What is at issue here is whether faculty members who teach in both the College Division and the Pre-College Division should be included.

Petitioner urges an analysis that does not utilize the dual function case law. Petitioner contends that the College Division employees who work as instructors in the Pre-College Division are not dual function employees because they do not perform more than one function for the Employer. Petitioner asserts these employees who instruct students in both of the Employer's divisions are "employees who are dually employed."

In essence, Petitioner argues that the dual function analysis should only be done where the employee works in two separate job functions for the Employer.

The Employer similarly crafts its argument that the inclusion of the College Division faculty who are also employed in the Pre-College Division must be determined on the basis of their community of interest with the petitioned-for Pre-College instructors.

Based upon the record, I conclude that there is a strong community of interest between those faculty members who teach exclusively in the Pre-College Division and those who teach in the Pre-College unit but also teach in the College Division. They perform the same work, work in the same area, share the same supervision, and are bound by the same administrative procedures. Moreover, they work shoulder-to-shoulder on the admissions auditions and second semester juries. The major difference argued by Petitioner is arguably the disparity in pay rates between the two groups. It would appear that those who are also on the College Division faculty primarily are the higher paid employees. The record is silent on why the highest paid instructors for the most part are also on the College Division faculty. It appears that some of it is explained based on tenure. However, upon closer evaluation, I cannot conclude that the pay rates are so dissimilar as to warrant exclusion from the unit. In analyzing the pay rates, there is some significant overlap in the pay rates. The salary range for those employees who work only in the Pre-College Division runs from a low of \$33 per hour to a high of \$142 per hour, and 16 of the 46 employees who are also employed in the College Division earn less than \$70 per hour, and 22 others earn less than the highest rate of \$142. Thus only 8 of the College Division instructors earn more than the highest rate earned by the highest paid Pre-College only employee. In this context, I cannot conclude that the hourly pay rate for College Division instructors is so high that they could not share a community of interest with the petitioned-for unit.

Petitioner also argues in its brief that the College Division faculty members who also teach in the Pre-College Division have better benefits not afforded to the Pre-College only faculty members. Chief in this is that Pre-College teaching hours count toward accumulating the requisite 10 hours needed for health benefits. Similarly, Petitioner contends that the Faculty handbook outline many other benefits that College division faculty receive that the Pre-College only faculty members do not. I am not persuaded by this argument. Except for hours worked in Pre-College instruction, all the benefits in the Handbook are earned as a result of the work they perform in that division. All employees working in the Pre-College Division are treated the same due that that employment. There are no greater benefits earned by College division instructions that derive from their Pre-College Division employment.

I would reach the same result if I was to apply the dual function analysis. The Board summarized its analysis of dual-function employees in *Martin Enterprises*, 325 NLRB 714 (1998):

[d]ual-function employees, employees who perform more than one function for the same employer, may vote even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. *Continental Cablevision of St. Louis County Inc.*, 298 NLRB 973 (1990); *Alpha School Bus Co.*, 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987). [E]mployees devoting less than 50 percent of their time to unit work may have sufficient interest in the terms and conditions of employment to warrant their inclusion in the unit. *Avco Corp.*, 308 NLRB 1045 (1992); *Berea Publishing Co.*, 140 NLRB 516 (1963).

In determining whether dual-function employees regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's working conditions, the Board has no bright line rule as to the amount of time required to be spent performing unit work. Rather, the Board examines the facts in each particular case. See, e.g., *Oxford Chemicals*, *supra* (employee who regularly performed unit work for 25 percent of each working day was included in the unit); *Davis Transport*, 169 NLRB 557, 562-563 (1968) (employees who spent less than 3 percent of their time performing unit work during 10-month period were not included in the unit).

Once an employee is determined regularly to perform a substantial amount of unit work, it is inappropriate to consider other aspects of the dual-function employee's terms and conditions of employment in a second-tier community-of-interest analysis. See *Oxford Chemicals*, *supra* (the Board, in determining that the dual-function employee was eligible to vote, overruled the administrative law judge's finding that the dual-function employee was ineligible based on four factors, including the employee's different hourly wage rate and insurance benefits, that the employee also performed clerical functions, and that the employee's work was less physically demanding than other unit employees).

There is some argument that I should apply the dual function analysis here. In *Columbia College*, 346 NLRB 726 (2006), the Board found that tutors who hold part-time adjunct faculty positions were dual function employees. The Board in *Columbia College* held that the "touchstone of dual-function employee status is the fact that a single employee performs multiple job functions covered by one or more of the employer's job classifications". *Supra* at p. 729. Once it is shown that a dual-function employee performs a substantial amount of unit work, a second tier community-of-interest analysis is not required. *Air Liquide America Corp.*, 324 NLRB 661, 662 (1997); *Fleming Industries*, 282 NLRB 1030 fn. 1 (1987). In applying this test, I would conclude that the record clearly establishes that the Pre-College faculty members, regardless of other employment, perform the identical work and work the same work schedule as those exclusively employed by the Employer in the Pre-College Division, and as dual function employees would be included in the unit.

Thus, regardless of the analytical framework that I use, I find that the College Division faculty members who teach in the Pre-College division must be included in the unit.

B.

Supervisory issues

The Petitioner seeks to exclude six individuals, Linda Chesis, Mark DeLeprioria, John Forconi, Maitland Peters, McNeil Robinson, and Mark Silverman, who are department chairs of the Employer, as supervisors under Section 2(11) of the Act in the College Division and thus excluded from eligibility to vote in the Pre-College unit because of their supervisory status⁴. The parties stipulated that these six individuals do not supervise any employee in the petitioned-for unit. Petitioner's argument is based on the fact that the six individuals are department chairpersons in their positions in the College Division.

The Employer contends that these department chairpersons are not statutory supervisors based upon the record evidence. In the alternative, the Employer contends that even if the record were to establish they were supervisory employees within the meaning of Section 2(11) of the Act, they “should be permitted to vote in connection with the second role where the supervisory component of his or her overall workload for the employer amounts to less than 50%. See *Amalgamated Clothing Workers of America*, 217 NLRB 98 (1975).”

The Board has held that the party seeking to exclude an individual as a supervisor bears the burden of establishing that such status, in fact, exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Benchmark Mechanical Contractors, Inc.* 327 NLRB 829 (1999). Mindful that a finding of a supervisory status removes an individual from the protection of the Act, the Board avoids attaching to Section 2(11) too broad a construction. *Adco Electric, Inc.*, 307 NLRB 1113, 1120 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993). The Board has noted that, in enacting Section 2(11) of the Act, Congress stressed that only persons with “genuine management prerogatives” should be considered supervisors, as opposed to “straw bosses, leadmen And other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677 (1985) (citing Senate Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)), *aff’d* in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The evidence on this record is insufficient to find the department chairs to be supervisors within the meaning of the Act. The testimony of David Gerber, the Dean of the Faculty for Instrumental Performance in the College Division, that the duties of department chairpersons include the oversight of the faculty in their department, is insufficient to establish supervisory status. The fact they department chairpersons act in collaboration with two faculty deans, to ensure that the Employer's policies are administered appropriately when a problem needs to be addressed, and that the chairperson also makes sure that the faculty member's student load is manageable, and that consensus is reached by the faculty on issues is similarly insufficient. This testimony regarding the authority exercised by chairpersons was vague and ambiguous. While Gerber also said that chairpersons would collaborate with the dean regarding the hiring and firing of faculty, the record established that the final decision is reached by the vice president, the dean of faculty and the relevant chairperson together. No specific examples were given of when or how frequently this occurred, nor was there any specific testimony as to the respective roles of the chairperson and dean in the hiring process. When asked if the chairperson would recommend hiring and firing, Mr. Gerber replied affirmatively but said that whether the recommendation was followed was a complicated matter because it would vary depending on the circumstances. This is the only record testimony regarding the chairperson supervisory issue.

Similarly, to the extent that the Petitioner relies on the Faculty Handbook to establish supervisory authority, I find that Petitioner has not met its burden of establishing that the chairpersons are statutory supervisors. The authority of the chairpersons as set forth in the Faculty Handbook is vague and conclusory. Even if I were to find that the description of the position in the Handbook is an accurate depiction of the authority of the position, the position does not appear to be supervisory under the Act.

In the provision on Faculty Appointments, the Handbook has nothing specific regarding hiring other than to state that “the vice president/dean of faculty in consultation with the president makes the final decision regarding hiring” and the role of the chairperson is described as merely consultative. The final decision regarding terminations rests with the vice president/dean of faculty. The role of the chairperson is again described as consultative and collaborative without any further specifics. With respect to processing grievances, the chairperson’s role is limited to administrative scheduling and convening a faculty committee to hear the grievance. It is the faculty committee that decides the grievance based on a vote of the committee’s members. Thus, the record evidence fails to establish that Petitioner met its burden of proof in this regard.

I similarly agree with the Employer that the record also fails to establish that Chris Rosenberg and Sonja Mason, should be excluded as statutory supervisors. The record is completely silent as to their responsibilities and whether they meet any of the indicia set forth in Section 2(11) of the Act.

Based upon the foregoing, I find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

INCLUDED: All faculty members employed by the Employer in its Pre-College division, including those College faculty members employed in the Pre-College Division.

EXCLUDED: All other employees, faculty members working exclusively in the College Division, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time⁵ and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations⁶. Eligible to vote are those in the unit who have a contract to work in the Employer's college division regardless of the number of hours they work and who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. In eligible to vote are the employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced⁷. Those eligible shall vote on

whether or not they desire to be represented for collective bargaining purposes by New York State United Teachers/American Federation of Teachers, AFL-CIO.⁸

Dated: March 26, 2009
at New York, New York

Celeste J. Mattina

Regional Director, Region 2

National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278